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No. 03-1274

IN THE

Supreme Court of the United States

JUANITA SWEDENBURG, *ET AL.*,

Petitioners,

v.

EDWARD D. KELLY, *ET AL.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PRIVATE RESPONDENTS

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QUESTION PRESENTED

Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners, plaintiffs-appellees below, are Juanita Swedenburg, in her own capacity, Juanita Swedenburg, as proprietor of Swedenburg Winery, a Virginia partnership, David Lucas, in his own capacity, David Lucas, as proprietor of The Lucas Winery, a California sole proprietorship, Patrick G. Fitzgerald, Cortes DeRussy, and Robin Brooks.

State respondents, defendants-appellants below, are Edward F. Kelly, Chairman of the New York State Liquor Authority, Division of Alcoholic Beverage Control, in his official capacity, and Lawrence J. Gedda and Joseph Zarriello, Commissioners of the New York State Liquor Authority, Division of Alcoholic Beverage Control, in their official capacities.

Private respondents, intervenor-defendants-appellants below, are Charmer Industries, Inc., Peerless Importers Inc., Premier Beverage Company LLC, and Eber Brothers Wine and Liquor Corp., each a New York-licensed alcoholic beverage wholesaler, Local 2D of the Allied Food and Commercial Workers International Union, a union comprised of commissioned alcoholic beverage salespeople in the New York-metropolitan area, and Metropolitan Package Store Association, Inc., a trade association of New York-licensed alcoholic beverage retailers.

RULE 29.6 STATEMENT

There are no amendments required to the corporate disclosure statement appearing in private respondents' brief on petition for a writ of certiorari.

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BRIEF FOR PRIVATE RESPONDENTS

STATEMENT OF THE CASE

Since the repeal of Prohibition, New York has restricted the importation and distribution of liquor to entities licensed and closely regulated by the State. On summary judgment, the district court held that this regulatory scheme violates the "dormant" Commerce Clause by "discriminating" against out-of-state liquor sellers who wish to sell wine to New York consumers without complying with New York's licensing requirements. The court of appeals reversed, concluding that § 2 of the Twenty-first Amendment—which prohibits the importation of liquor "into any State . . . in violation of the laws thereof"—had "constitutionalized" New York's regulatory scheme so as to protect it from dormant Commerce Clause challenge.

1. Before Prohibition, many States enacted licensing and other laws to restrict or prohibit the importation and sale of alcoholic beverages. Although the Court initially sustained the constitutionality of such laws (*see The License Cases*, 46 U.S. (5 How.) 504 (1847)), in the latter part of the nineteenth century they increasingly ran afoul of what is now known as the "dormant" Commerce Clause. In *Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U.S. 465 (1888), for example, the Court struck down a state statute that prohibited common carriers from importing alcohol into the State without a permit. Two years later, in *Leisy* v. *Hardin*, 135 U.S. 100 (1890), the Court held that a state regulation prohibiting the sale of imported alcohol likewise ran afoul of the dormant Commerce Clause. The Court reasoned that as long as the liquor was sold in its original packages, it remained an article of interstate commerce and, as such, was beyond state regulation absent congressional authorization. *Id.* at 124-25.

At the States' urging, Congress responded to *Leisy* by enacting the Wilson Act. Entitled "[a]n Act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases," the Wilson Act authorized the States to regulate imported alcohol "upon arrival in such state . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State," regardless of whether such alcohol was in its "original packages." Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121). A year later, the Court upheld the Wilson Act in *In re Rahrer*, 140 U.S. 545 (1891), holding that Congress, through the exercise of its commerce power, was free to "divest[]" articles of commerce of their "interstate" "character." *Id.* at 562.

Before long, however, this Court narrowly construed the Wilson Act in a manner that impeded the States' ability to control the influx of liquor. In *Scott* v. *Donald*, 165 U.S. 58 (1897), the Court held that, despite the Wilson Act, a State lacked the power to "recognize[] the manufacture, sale and use of intoxicating liquors as lawful" for domestic consumption while "discriminat[ing] against the bringing of such articles in, and importing them from other States." *Id.* at 101. Congress had not meant to legitimize state legislation of that type, the Court believed, and—because such legislation therefore remained subject to Commerce Clause scrutiny—it was "void as a hindrance to interstate commerce." *Ibid.* Then, in the companion cases of *Rhodes* v. *Iowa*, 170 U.S. 412 (1898), and *Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438 (1898), the Court held, respectively, that alcohol did not "arrive" in a State for purposes of the Wilson Act until it reached its final destination therein (as opposed to the moment it crossed that State's border), and that the Act therefore could not save state laws that purported to prohibit individuals from ordering alcohol (such as through mail order) for personal consumption from out-of-state vendors.

Congress again responded, this time to close the loopholes created by decisions such as *Scott*, *Rhodes* and *Vance*.

The measure was the Webb-Kenyon Act. Act of Mar. 1, 1913, ch. 90, § 1, 37 Stat. 699 (codified at 27 U.S.C. § 122). Entitled "[a]n act divesting intoxicating liquors of their interstate character in certain cases," the Webb-Kenyon Act provides, in unambiguous terms, that the "shipment or transportation . . . of any . . . intoxicating liquor . . . from one State . . . into any other State . . . in violation of any law of such State . . . is prohibited." *Id.*

This Court sustained the constitutionality of the Webb-Kenyon Act against a non-delegation challenge in *Clark Distilling Co.* v. *Western Maryland Railway Co.*, 242 U.S. 311 (1917). In that case, the Court also rejected the argument that the new Act should be narrowly construed so as to continue to subject discriminatory state laws to Commerce Clause scrutiny. *Id.* at 322. "The antecedents of the Webb-Kenyon Act," said the Court, "leave no room for the contention made." *Id.* at 323. In particular, the Court adverted to the Wilson Act and to this Court's cases holding that the "receipt and the possession . . . and the resulting right to use" imported liquor "remained protected by the commerce clause." *Ibid.* (citing *Vance*, *supra*). "Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it," the Court concluded, "there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act; that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws . . . . [I]f that be not true, the coming into being of the act is wholly inexplicable." *Id.* at 323-24.

The Court accordingly construed the Webb-Kenyon Act as "t[aking] the protection of interstate commerce away from *all* receipt and possession of liquor prohibited by state law." *Id.* at 325 (emphasis added). That construction of the Webb-Kenyon Act also disposed of any conceivable Commerce Clause objection to the West Virginia statutes at issue, the

Court held, for "if th[e] act was within the power of Congress to adopt"—as the Court concluded it was—"there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution." *Ibid.*

2. The Eighteenth Amendment mooted any further litigation by creating a national ban on "the manufacture, sale, or transportation of intoxicating liquors." U.S. CONST. amend. XVIII, § 1. With the ratification of the Twenty-first Amendment in 1933, however, the States were once again given the power to regulate the importation and use of intoxicating liquors within their borders—this time by constitutional amendment. In particular, Section 2, patterned after the Webb-Kenyon Act, "prohibited" the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof." U.S. CONST. amend. XXI, § 2.[1]

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[1] Section 2 incorporated the substance of the Webb-Kenyon Act in order to preserve for posterity its grant of authority to the States. *See* 76 CONG. REC. 4,141 (1933) (Sen. Blaine), 4,172 (Sen. Borah) (both recognizing that the effect of Section 2 was to incorporate Webb-Kenyon "permanently into the Constitution"). Senator Borah, the principal proponent of Section 2 when the Twenty-first Amendment was debated in Congress, offered two reasons why Section 2 was warranted in light of Webb-Kenyon. First, he noted that the Webb-Kenyon Act had been sustained in *Clark Distilling* "by a divided court, [and] might very well be held unconstitutional upon a re-presentation of it." 76 CONG. REC. 4,170. The Webb-Kenyon Act had been vetoed by President Taft as an invalid "delegation by Congress to the States of the power regulating interstate commerce" (49 CONG. REC. 4,291 (1913)), and this Court was on the verge of striking down significant components of the New Deal on this ground. *See Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Ref. Co.* v. *Ryan*, 293 U.S. 388 (1935).

Neither the Webb-Kenyon Act nor the Wilson Act had been repealed during Prohibition. Nonetheless, two years after ratification of the Twenty-first Amendment, Congress reenacted the Webb-Kenyon Act without change as part of a general post-Prohibition overhaul of federal liquor laws. *See* Act of Aug. 27, 1935, ch. 740, tit. II, § 202(b), 49 Stat. 872, 877-78. Congress did not reenact the Wilson Act, which remains on the books solely by virtue of its original passage in 1890. *See* Act of Aug. 8, 1890, ch. 728, 26 Stat. 313.

3. New York, exercising its then-new authority under § 2 of the Twenty-first Amendment, enacted its Alcoholic Beverage Control Law ("ABC Law") in 1934. C.A. App. 3633-89. As did most States, New York adopted a "three-tier" regulatory system for distribution of alcoholic beverages under which out-of-state producers of alcoholic beverages typically sell their products to New York-licensed wholesalers, who then sell them to New York-licensed retailers, who, in turn, sell them to in-state consumers. Thus, under New York's ABC Law, unlicensed purveyors of alcohol cannot legally ship their products directly to consumers located within New York State. The core of this system is ABC Law § 102(1)(c), which provides that no liquor may be shipped into New York unless the consignee is licensed, and § 102(1)(d), which prohibits common carriers and others from delivering liquor to anyone other than a licensed consignee. *See* Pet. App. 81a-82a.

Under New York law, a "licensed winery" is a winery that meets the licensure requirements (such as passing a background check and paying the requisite taxes and fees) and "maintains a branch factory, office or storeroom within the State of New York." J.A. 11-12 (ABC Law § 3(37)). A licensed winery may obtain a retail license allowing it to ship

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Second, Senator Borah was also concerned that a later Congress might repeal Webb-Kenyon. 76 CONG. REC. 4,170.

wine directly to New York consumers. Pet. App. 7a-8a (citing ABC Law §§ 76(4), 77(2)). "Thus, unlike in other states, out-of-state wineries are permitted to seek and obtain a New York license to distribute and sell alcohol. They must, however, comply with the licensing requirements of the ABC Law, including establishing and maintaining a physical presence in New York." Pet. App. 8a (footnote omitted).

4. Petitioners, who are out-of-state wine producers and in-state wine consumers, sued the state respondents, who are officials of the agency charged with administering and enforcing New York's ABC Law. Petitioners sought a declaration that the prohibitions on direct shipment codified in ABC Law §§ 102(1)(c) and (d) are unconstitutional under the dormant Commerce Clause because they prohibit out-of-state wineries who elect not to comply with New York's licensing requirements from shipping their wines directly to New York consumers, while other provisions of the ABC Law permit licensed, in-state wineries to make such shipments. Private respondents, who are liquor wholesalers and representatives of liquor retailers, intervened as defendants.

The district court granted summary judgment to petitioners, "conclud[ing] that the New York ban on the direct shipment of out-of-state wine is unconstitutional." Pet. App. 35a. The court first ruled that the New York regime "burdens interstate commerce and is discriminatory (on its face)" because "out-of-state wineries must consign their products to a (three-tier) wholesaler, [but] in-state wineries do not." *Id.* at 53a. The district court then concluded that New York's prohibition on direct shipment by unlicensed liquor sellers does not "implicate the State's core concerns under the Twenty-first Amendment," because the State's concerns "can be addressed (in a nondiscriminatory manner) for out-of-state as well as for in-state wineries." Pet. App. 59a, 61a.

As remedy, the district court enjoined the state respondents from enforcing ABC Law §§ 102(1)(c) and (d) "in [a]

manner that would prohibit (i) the winery plaintiffs from shipping their wine to New York consumers on the same terms and conditions applicable to New York wineries and (ii) the consumer plaintiffs from receiving wines shipped directly to them from out-of-state wineries on the same terms and conditions applicable to consumers of New York wineries." Pet. App. 72a.

5. The court of appeals reversed. Pet. App. 1a-33a. After reviewing the "[l]egal [h]istory" of the Twenty-first Amendment, including this Court's decisions in *Bowman*, *Leisy*, and *Rhodes*, as well as Congress's responses to them with the Wilson and Webb-Kenyon Acts, the court observed that the language of "Section 2 effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state." *Id.* at 16a.

The court of appeals also analyzed this Court's cases construing the Twenty-first Amendment, and "disagree[d] with the proposition that [this] Court's Twenty-first Amendment jurisprudence confines the scope of section 2 to state regulations that advance so-called core concerns." Pet. App. 17a. The court found that, with respect to the issue raised here, this Court's Twenty-first Amendment cases have been consistent and unambiguous in reserving to the States broad power over interstate transportation and intrastate distribution of alcohol, whereas the cases on which petitioners relied primarily involved state laws that were at odds with valid assertions of federal authority or with provisions of the Bill of Rights, or state laws that impermissibly attempted to regulate the internal affairs of other States. *Id.* at 18a-19a, 23a-24a. "[I]n each case," the court observed, this "Court unequivocally reaffirmed the principle that insofar as section 2 permits each state to regulate alcohol traffic within its borders it 'primarily created an exception to the normal operation of the Commerce Clause.'" *Id.* at 23a (quoting *Craig* v. *Boren*, 429 U.S. 190, 206 (1976)). In light of that purpose, the court noted, "[a]llowing dormant Commerce Clause concerns to

restrict state regulatory schemes that focus on the importation of liquor would render section 2 a nullity." *Id.* at 16a.

Applying these principles to New York's regulatory regime, the court held that "New York's . . . regime falls squarely within the ambit of section 2's grant of authority." Pet. App. 25a. The court determined that New York's statutory scheme "regulates only the importation and distribution of alcohol in New York"; that "New York's prohibition of the sale and shipment of wine by unlicensed wineries directly to New York consumers serves valid regulatory interests"; that there was "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests"; that New York's regulatory scheme is not discriminatory because, unlike in other States, "[a]ll wineries, whether in-state or out-of-state, are permitted to obtain a license as long as the winery establishes a physical presence in the state"; and that the ABC Law's mandate that all licensees establish a physical presence in the State serves valid regulatory functions such as ensuring that those trafficking in alcohol are accountable to the State. *Id.* at 25a-29a. Accordingly, the court of appeals reversed the district court's grant of summary judgment in favor of petitioners on their dormant Commerce Clause claim.[2]

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[2] The court also rejected petitioners' claim that New York's statute violates the Privileges and Immunities Clause of Article IV. *Id.* at 29a-30a. Although this Court declined petitioners' bid to obtain review of that ruling, petitioners continue to urge the Court to address their Article IV contentions on the basis of briefing submitted by one of their *amici*. Pet. Br. 15 n.12 (citing Br. of Virginia Wineries Association as *Amicus Curiae*). These contentions are not properly before this Court. *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999); *Reno* v. *Koray*, 515 U.S. 50, 55 n.2 (1995); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979).

SUMMARY OF ARGUMENT

I. Section 2 of the Twenty-first Amendment prohibits the importation of liquor into any State for delivery or use therein in violation of that State's laws. The direct shipment of liquor from an unlicensed, out-of-state seller to an unlicensed, in-state buyer violates the laws of New York. Regardless of whether this regulatory scheme would pass muster under the dormant Commerce Clause for commodities other than liquor, the Twenty-first Amendment expressly authorizes the New York statute at issue.

A. This Court's Twenty-first Amendment cases *all* compel the conclusion that New York's three-tier system, including the ban on direct shipment by unlicensed liquor sellers, is constitutional.

1. Soon after the ratification of the Twenty-first Amendment, this Court unanimously rejected precisely the same argument that petitioners advance in this case. *State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936). Although the plaintiffs in that case argued, as petitioners do here, that the Commerce Clause requires States to allow imported liquors to compete "on equal terms" with domestic ones, this Court concluded that such a conclusion was not possible absent a "rewriting" of the Twenty-first Amendment. *Young's Market* was followed in a series of cases that upheld against dormant Commerce Clause challenge numerous state laws regulating the importation of liquor, all of which this Court held or assumed were "discriminatory" in the sense used by petitioners here—*i.e.*, they regulated "importation" of liquor under Section 2 by targeting the shipment of liquor from out-of-state sources. These decisions, issued in the immediate wake of the Twenty-first Amendment's ratification, provide an authoritative guide to its meaning.

2. Petitioners all but ignore these cases notwithstanding the fact that the reasoning of those decisions has "remained unquestioned." *Hostetter* v. *Idlewild Bon Voyage Liquor*

Corp., 377 U.S. 324, 330 (1964).. And the more recent decisions on which they rely offer no more support for their position. Most of the cases on which petitioners rely are simply inapposite because they involved state laws that conflicted with valid federal statutes, *e.g.*, *Hostetter*, *supra*, or with provisions of the Constitution other than the dormant Commerce Clause, *Craig* v. *Boren*, 429 U.S. 190 (1976).

The dormant Commerce Clause cases cited by petitioners are no more persuasive. One strand of authority holds that because the Twenty-first Amendment "confers no authority to control sales in other States," state laws with extraterritorial effects may be unconstitutional. *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 585 (1986). But there is no claim of extraterritoriality in this case. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), is similarly inapposite. The Court there struck down a discriminatory tax statute that did not purport to regulate the "transportation or importation" of liquor into the State *at all*, and which concededly had been enacted solely to protect local industry. Thus, the essential predicate for the Court's Commerce Clause analysis in *Bacchus* was that the statute fell outside the ambit of the Twenty-first Amendment. The New York licensing scheme, by contrast, directly regulates the importation of intoxicants and is expressly authorized by the Twenty-first Amendment.

B. The traditional three-tier distribution system is an "unquestionably legitimate" means of "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota* v. *United States*, 495 U.S. 423, 432 (1990). New York's scheme furthers these same regulatory interests.

1. Those who wish to sell liquor in New York are subject to a host of regulatory requirements, but New York reasonably treats all liquor purveyors alike: They must *all* sell through an entity that is licensed by, and fully accountable to, the State. An out-of-state wine producer thus may freely sell

to New York consumers through the three-tier system, or he may obtain his own New York license. To be sure, obtaining a license requires him to shoulder some of the burdens that New York imposes on licensed in-state wine sellers, such as maintaining a physical presence in the State so that state officials can readily monitor his compliance with the regulatory structure. But petitioners never satisfactorily explain why this type of licensing requirement is not at the very core of what the text of the Twenty-first Amendment authorizes. Certainly, the proposition that out-of-state liquor sellers are entitled to create their own unregulated interstate market to compete with licensed in-state sellers would have come as a surprise to those who framed the Twenty-first Amendment.

2. Petitioners' objection that the three-tier system raises prices and reduces consumer choice is irrelevant. The Twenty-first Amendment expressly allows a State to regulate what (if any) kind of liquor is available to its residents, and at what price. This authority is not defeated by petitioners' claim of "protectionism." In any event, as the court of appeals noted, there is no basis in the record for concluding that New York's regulatory scheme is intended to favor local interests over out-of-state interests.

II. Wholly apart from the Twenty-first Amendment, the dormant Commerce Clause is not implicated here because Congress, in the Webb-Kenyon Act, divested liquor of its interstate commerce character.

1. The dormant Commerce Clause operates only in the absence of congressional action; where Congress has acted, there is no dormant Commerce Clause issue. Congress may authorize States to do that which they otherwise could not—including discriminate against out-of-state interests. *E.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946).

2. The Webb-Kenyon Act prohibits the "shipment or transportation" of liquor into a State in violation of its laws. 27 U.S.C. § 122. This Court has explained that the statute "took the protection of interstate commerce away from all re-

ceipt and possession of liquor prohibited by state law." *Clark Distilling*, 242 U.S. at 325. As a result, as this Court held, "there is no possible reason" why a law such as New York's "would conflict with the commerce clause of the Constitution." *Ibid.* Petitioners essentially ignore the Webb-Kenyon Act, and do not so much as cite this Court's decision in *Clark Distilling*. Their treatment of controlling authority speaks volumes of the weakness of their position.

III. Petitioners urge this Court to apply a novel form of constitutional analysis under which laws that are squarely within the ambit of Section 2 must nonetheless still be subjected to dormant Commerce Clause scrutiny. Although petitioners tout this approach as a necessary recognition that both provisions are part of the same Constitution, their analysis turns out to be all Commerce Clause and no Twenty-first Amendment. If this Court were to adopt petitioners' hybrid approach as correct, the Twenty-first Amendment would require that the unique constitutional status of liquor be given significant weight in the dormant Commerce Clause analysis. Since New York's regime is not facially discriminatory and does not unduly burden interstate commerce, it does not violate the dormant Commerce Clause even if the same regime would have constitutional difficulty as applied to commodities other than liquor.

IV. If there is any constitutional defect in the New York regulatory regime, the appropriate remedy is to sever and strike the offending provisions. Rather than opening the State's borders to unregulated liquor by judicial fiat, as petitioners request, all liquor should be channeled through the three-tier system.

ARGUMENT

In asking this Court to reinstate the injunction entered by the district court—which precluded the responsible state officials from enforcing New York's statutory ban on direct shipment of wine from unlicensed producers to New York

consumers—petitioners seek nothing less than the dismantling of New York's 70-year-old three-tier distribution system. Petitioners' argument fails for four reasons. *First*, the relief they seek is foreclosed by § 2 of the Twenty-first Amendment, which removes state laws regulating the importation and sale of alcohol from scrutiny under the dormant Commerce Clause. *Second*, by enacting the Webb-Kenyon Act—and reenacting that statute after the repeal of Prohibition—Congress expressly authorized the New York statutes challenged by petitioners here, and that congressional authorization necessarily is fatal to petitioners' challenge under the *dormant* Commerce Clause. *Third*, New York's regulatory regime would pass muster under the hybrid approach that petitioners themselves proffer as an accommodation between the dormant Commerce Clause and the Twenty-first Amendment. *Fourth*, and finally, even if the New York scheme could be said to unconstitutionally discriminate in favor of in-state wineries, the appropriate remedy is not to open the floodgates to all unlicensed vintners but rather to require all producers, in-state and out-of-state, to sell only through the traditional three-tier structure.

I. New York's Direct-Shipment Ban Cannot Violate The Dormant Commerce Clause In Light Of Section 2 Of The Twenty-first Amendment

Although petitioners spend much ink touting the virtues of farming and the richness of this country's agricultural history, the legal issues before this Court have little if anything to do with viticulture or premium winemaking. The question before the Court is whether petitioners are entitled to opt out of New York's licensing requirements and to "compete" with regulated in-state entities by creating their own unregulated interstate market in liquor. To the extent history is relevant to the issues before the Court, it is the history of our Nation's experiment with Prohibition and the unique constitutional compromise on the issue of alcoholic beverages—the history that produced the Twenty-first Amendment. Petitioners are

virtually silent on *that* history—or, for that matter, the *text* of the Twenty-first Amendment—and they are equally coy about explaining why their submissions here would not also lead to unregulated interstate sales of alcoholic beverages other than premium wine—beer, whiskey, rum, bourbon or vodka.

Petitioners' argument is squarely foreclosed both by the text and the history of the Twenty-first Amendment. As to text, Section 2 of the Twenty-first Amendment provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. CONST. amend. XXI, § 2. There can be no dispute that the direct shipment of wine (or beer, whiskey, rum, bourbon or vodka)—*i e.*, the "transportation or importation" of liquor from an unlicensed seller to an unlicensed buyer—is "in violation of the laws" of New York. *See* ABC Law §§ 102(1)(c) and (d). Under the plain terms of the Twenty-first Amendment—and regardless of what otherwise might be the case under the dormant Commerce Clause for commodities other than liquor—such direct shipments are "prohibited"—period.

As to history, petitioners do not dispute that the contemporary understanding of the Twenty-first Amendment by those who lived through its framing cannot be reconciled with the dormant Commerce Clause claim that petitioners press here. Nor can they: not only did Congress promptly reenact the Webb-Kenyon Act—adding its own imprimatur to the States' virtually unqualified power over liquor commerce—but barely three years after the Amendment was ratified, this Court unanimously refused to interpret the new amendment as petitioners would have the Court do here. *See State Bd. of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936). Petitioners nonetheless dismiss "[t]his Court's early cases" without discussion and—relying on a string of law review commentaries—contend that this Court's "more re-

cent cases" should lead to a different outcome. Pet. Br. 33 n.22.

Petitioners' contention is doubly flawed. First, it gets exactly backward the rule that this Court generally applies to constitutional adjudication—*viz.*, that "in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex parte Bain*, 121 U.S. 1, 12 (1887). Although that interpretive approach has been applied by this Court to countless provisions of the original Constitution and to constitutional amendments (*see, e.g.*, *Myers* v. *United States*, 272 U.S. 52, 175 (1926) (collecting authorities); *see also Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936)), petitioners do not even attempt to explain why their more "recent" understandings should trump the judgment of those who lived through Prohibition and its repeal. Second, and more fundamentally, petitioners are wrong to suggest that in its "recent cases" this Court has somehow departed from its original understanding of Section 2. This Court's Twenty-first Amendment cases, whether "early" or "more recent," *all* compel the conclusion that New York's three-tier system is constitutional.

A. The Twenty-first Amendment Authorizes States To Prohibit, Restrict, Or "Discriminate" Against The Importation Of Out-Of-State Liquor

1. In its first decision construing the Twenty-first Amendment, this Court emphasized that "the language of the Amendment is clear." *Young's Market*, 299 U.S. at 63-64. "[S]o far as concerns intoxicating liquors," the Court explained, "[t]he words used are apt to confer upon the State the power to forbid *all* importations which do not comply with the conditions which it prescribes." *Id.* at 62 (emphasis added). The plaintiffs in *Young's Market*—wholesalers who complained of a $500 license fee for imported, but not do-

mestic, beer—asked the Court "to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms." *Ibid.* The Court rejected this argument out of hand: "To say that," the Court explained, "would involve not a construction of the Amendment, but a rewriting of it." *Ibid.*

Petitioners' position in this case is no more consistent with the text of the Twenty-first Amendment than was the wholesalers' in *Young's Market*. Their contention that New York must permit *un*licensed wineries—whether in-state or outside of New York—to ship to consumers "on equal terms" with wineries licensed and regulated by the State (whether based in New York or elsewhere) is no more reconcilable with the plain terms of the Twenty-first Amendment today than it was in 1936. Indeed, *Young's Market* is dispositive of this case. The Court unanimously declared that, under the Twenty-first Amendment, a State "may permit the domestic manufacture of beer and exclude all made without the State"—or, "instead of absolute exclusion, subject the foreign article to a heavy importation fee." 299 U.S. at 63. On petitioners' view of the case, that is essentially what New York has done here: their complaint is that New York's licensing requirements, and in particular the requirement that sellers maintain an in-state presence that can be readily monitored by state regulators, amount to the imposition of a heavy import fee as a condition of shipping out-of-state wine directly to consumers. Pet. Br. 24-25.

To the extent that such conditions on the importation of liquor might be viewed as "discrimination," the fact that such "discrimination" necessarily is permitted by the plain text of the Twenty-first Amendment was not lost on this Court. To the contrary, in *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401 (1938), the Court considered a state statute that prohibited the importation of liquor with an alcohol content greater

than 25% unless such liquor was registered, but allowed such liquor produced in-state to be sold without registration. The Court sustained the statute as within the scope of authority conferred by the Twenty-first Amendment: "The statute clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere. . . . That, under the [Twenty-first] Amendment, discrimination against imported liquor is permissible although it is not an incident of reasonable regulation of the liquor traffic, was settled by [*Young's Market*]." *Id.* at 403.

One Term later, the Court again upheld against dormant Commerce Clause challenge similar state laws regulating the importation of alcoholic beverages. In *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391 (1939), plaintiff challenged a Michigan statute that "discriminated" against out-of-state producers by prohibiting Michigan beer sellers from selling beer manufactured in any of ten specified States. Holding that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause," the Court unanimously rejected plaintiffs' claim. *Id.* at 394; *see also Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939) (upholding similar Missouri law against dormant Commerce Clause challenge and explaining that "[s]ince [the Twenty-first] amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"); *Ziffrin* v. *Reeves*, 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause").

In sum, from *Young's Market* to *McKittrick* and *Ziffrin*, every case that this Court decided in the immediate aftermath of the ratification of the Twenty-first Amendment squarely rejected—often unanimously—the very dormant Commerce Clause claim that petitioners press here. Because those decisions carry the "authority that comes from contemporaneous knowledge of the purposes of the . . . Amendment" (*Louisi-*

ana ex rel. Francis v. *Resweber*, 329 U.S. 459, 467 (1947) (Frankfurter, J., concurring)), they supply an "impressive gloss of history" as to the correct meaning of the Twenty-first Amendment. *Ludecke* v. *Watkins*, 335 U.S. 160, 165 (1948).

2. Far from being overruled or abandoned—as suggested by petitioners' laconic dismissal of them as "early" cases—the understanding that this Court expressed in those cases of the relationship between the dormant Commerce Clause and the Twenty-first Amendment has "remained unquestioned." *Hostetter*, 377 U.S. at 330. Quite simply, as the Court put it in *Hostetter*, "'[s]ince the Twenty-first Amendment, . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.'" *Ibid.* (quoting *Indianapolis Brewing*). Indeed, this Court's "more recent cases" uniformly reiterate that core holding of *Young's Market* and its progeny.[3]

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[3] *See, e.g., 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 514-15 (1996) ("The States' regulatory power over this segment of commerce is . . . largely 'unfettered by the Commerce Clause'") (quoting *Ziffrin*); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 712 (1984) ("§ 2 reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause") (citing, *inter alia*, *Young's Market*); *Craig*, 429 U.S. at 206 ("This Court's decisions . . . have confirmed that the [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause"); *see also North Dakota* v. *United States*, 495 U.S. 423, 431 (1990) (plurality opinion) (citing, *inter alia*, *Young's Market* for the proposition that the States have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system"); *id.* at 447 (Scalia, J., concurring in judgment) (noting that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler").

Petitioners nonetheless claim that "[t]he question posed by the Court has been decided repeatedly and correctly" in their favor. Pet. Br. 38. In support of this claim, they cite fewer than half of the decisions of this Court in which the Twenty-first Amendment was construed. The decisions they cite—and, indeed, every decision of this Court in which that Amendment has been at issue—fall into three categories: (a) cases in which a State's power under the Amendment was said to be at odds with federal laws validly enacted pursuant to Congress's own authority under the Commerce Clause; (b) cases in which the State was required to comply with another express provision of the Constitution (apart from the Commerce Clause); and (c) cases involving dormant Commerce Clause challenges to state statutes that did not fall within the power conferred by the text of the Twenty-first Amendment. None of these decisions even remotely suggests that New York's ABC Law is constitutionally suspect.

a. *Hostetter* is emblematic of the first category of cases on which petitioners rely—*i.e.*, cases that involve an affirmative exercise of Congress's own commerce power in areas not expressly addressed by the Twenty-first Amendment. Congress had authorized Idlewild Bon Voyage Liquor Corporation (Idlewild) to sell bottled wines and spirits to international airline passengers departing from New York's JFK airport. Only travelers were allowed to buy such liquor, which was not distributed until arrival overseas. This Court rejected New York's claim that Idlewild's activities violated the ABC Law for two related reasons. *First*, New York's attempt to regulate Idlewild's liquor sales was unsupported by the *text* of the Twenty-first Amendment, because the "ultimate delivery and use" of the liquor in question was "not in New York, but in a foreign country." 377 U.S. at 333-34. Application of the ABC Law in these circumstances would have an impermissible extraterritorial regulatory effect—an effect that the Twenty-first Amendment does not authorize. *Second*, New York's position conflicted with a federal statute

that had been validly enacted under Congress's own constitutional power to regulate foreign commerce. *Ibid.*[4]

It was in *this* context—where Congress had passed legislation that conflicted with a state liquor law that was itself unauthorized by the plain text of the Amendment—that the Court derided as an "absurd oversimplification" the notion that the Twenty-first Amendment "has somehow operated to 'repeal' the Commerce Clause." *Id.* at 331-32. *Hostetter* did *not* hold, as petitioners misleadingly imply (Br. 33), that state laws restricting the importation of liquor for domestic consumption are subject to *dormant* Commerce Clause challenge; on the contrary, it reiterated that they are not. 377 U.S. at 330 ("a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders"). Indeed, the Court did not even suggest that Congress may, by statute, override a state law that is squarely within the text of the Amendment; it held only that New York's enforcement actions conflicted with federal laws that validly addressed foreign commerce. That holding provides no assistance to petitioners.

Similarly, nothing in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), supports petitioners' overwrought contention that the decision below "would divest Congress of its power" over anticompetitive conduct. Pet. Br. 34. *Midcal* considered a Cali-

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[4] *Hostetter* thus "involved the relation between § 2 and Congress' authority to legislate under the (positive) Commerce Clause," whereas "the *Young's Market* line concerned States' authority to regulate liquor unconstrained by the *negative* Commerce Clause in the absence of any congressional pronouncement." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 556 (1991) (O'Connor, J., joined by Rehnquist, C.J. and Kennedy, J., dissenting).

fornia statute that required all wine wholesalers to charge for a brand of wine the price determined by the wine's producers. As in *Hostetter*, this Court concluded that California's statute was not supported by the "language" of the Amendment, because it was not addressed to the "transportation or importation" of liquor from other states. 445 U.S. at 106-07. And, as in *Hostetter*, the Court additionally concluded that the state law also conflicted with a federal statute "adopted under the commerce power," *viz.*, the Sherman Act. *Id.* at 106. Like *Hostetter*, therefore, *Midcal* provides no support for petitioners' arguments under the *dormant* Commerce Clause. Quite the contrary, *Midcal* reaffirmed that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110.

b. The second category of cases cited by petitioners holds that the States cannot "ignore their obligations under other provisions of the Constitution" (*Capital Cities*, 467 U.S. at 712)—*i.e.*, the affirmative limitations on state power, apart from the dormant Commerce Clause, that were unaffected by the Twenty-first Amendment. Thus, the fact that a state law regulates liquor does not exempt the State from complying, for example, with the Equal Protection Clause (*Craig*, 429 U.S. at 206-10) or the First Amendment (*44 Liquormart*, 517 U.S. at 516).[5]

Petitioners disingenuously assert that "this Court found no impediment to invalidating . . . discriminatory purchase

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[5] In addition to the cases in this line cited by petitioners, *see Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (striking state alcohol regulation as violative of Establishment Clause); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (same under Due Process Clause); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (same under Export-Import Clause).

rules" in *Craig*. Pet. Br. 36-37. But *Craig* involved discrimination on the basis of *sex*, which is prohibited by the Fourteenth Amendment and is not addressed in the Twenty-first Amendment. 429 U.S. at 207 n.21 ("The Twenty-first Amendment does not recognize, even indirectly, classifications based upon gender"). To the extent this case involves discrimination at all, the classifications drawn by New York are based on the unlicensed nature of out-of-state liquor—precisely the sort of "discrimination" the Twenty-first Amendment expressly allows the States to practice by prohibiting the "importation" of liquor in violation of state law. *Id.* at 206-07. Indeed, the cases in this category uniformly reiterate the States' broad authority to regulate the transportation or importation of alcoholic beverages intended for domestic use. *See, e.g., Capital Cities*, 467 U.S. at 712 ("The States enjoy broad power under § 2 of the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders"); *James B. Beam Distilling*, 377 U.S. at 346 ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders").

As *Craig* put it, the Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," but "beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." 429 U.S. at 206. *Craig* and the other cases in this category involved those other provisions, whereas this case involves only the dormant Commerce Clause. Since the only issue before the Court is whether New York's ABC Law is invalid under the dormant Commerce Clause, these cases stand as no barrier to the enforcement of New York's direct-shipment ban.

c. The third, and final, category of cases on which petitioners rely are those in which the Court considered a dor-

mant Commerce Clause challenge to state liquor laws. As previously noted, the Court's so-called "early cases" hold that the Twenty-first Amendment necessarily insulates from dormant Commerce Clause scrutiny any state laws that address the "transportation or importation" of liquor into any State for use therein.[6] No "recent" Commerce Clause case casts doubt on that conclusion. Instead, the handful of dormant Commerce Clause cases cited by petitioners involve state laws that this Court found not to be within the power conferred upon States by the plain text of the Twenty-first Amendment.

In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986), for example, the Court struck down New York's price-affirmation statute, which required all distillers selling liquor to in-state wholesalers to affirm in filings with the State Liquor Authority that such sales would take place at the lowest price the distiller charged wholesalers anywhere else in the United States. The Court confirmed that "New York has a valid constitutional interest in regulating sales of liquor within the territory of New York" and that the Twenty-first Amendment "gives New York . . . the authority to control sales of liquor in New York." *Id.* at 585. But since the Amendment "confers no au-

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[6] Petitioners claim that the court below "acknowledged that the ban 'create[s] substantial dormant Commerce Clause problems.'" Pet. Br. 12. What the court of appeals *actually* said, however, was: "We fully recognize that the physical presence requirement *could* create substantial dormant Commerce Clause problems *if* this licensing scheme regulated a commodity other than alcohol." Pet. App. 26a (emphases added). But the ABC Law *does* regulate alcohol; as Judge Easterbrook put it, "§ 2 of the twenty-first amendment empowers [the States] to control alcohol in ways that [they] cannot control cheese." *Bridenbaugh* v. *Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000), *cert. denied sub nom. Bridenbaugh* v. *Carter*, 532 U.S. 1002 (2001).

thority to control sales in *other* States," the Court invalidated the price-affirmation law. *Ibid.* (emphasis added).

The Court reached the same conclusion in *Healy* v. *Beer Institute, Inc.*, 491 U.S. 324 (1989), where the Court invalidated Connecticut's "price affirmation" statute. *Id.* at 342 ("Here, as in *Brown-Forman*, our finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue"). *Brown-Forman* and *Healy* thus hold that the Twenty-first Amendment gives the States virtually plenary power to regulate liquor imported for domestic use, but no power to export their regulatory regimes to other states. The fact that *extraterritorial* regulations remain subject to dormant Commerce Clause challenges, however, is of no assistance to petitioners. There is no claim in this case that New York's direct-shipment ban has any extraterritorial regulatory effect; on the contrary, in keeping with the plain language of the Twenty-first Amendment, the New York provisions challenged here restrict only unlicensed sellers who seek to import liquor for use within the State.[7]

Bacchus Imports, Ltd. v. *Dias*, 468 U.S. 263 (1984), which petitioners tout as "[t]he paradigm case for analyzing facially discriminatory barriers to commerce in alcohol" (Br. 35), is similarly inapposite. *Bacchus* involved a Hawaii statute that imposed a 20% excise tax on liquor but exempted certain locally produced products, such as pineapple wine, from the tax. The Court found that the statute was not "closely related to the powers reserved by the Twenty-first

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[7] The extraterritoriality decisions do not break tradition with *Young's Market*, as petitioners intimate (Br. 34); to the contrary, they follow directly from an "early decision" giving effect to the plain text of the Amendment's "delivery or use" phraseology. *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) (holding that California could not regulate the sale of alcohol in a federal enclave).

Amendment" (*id.* at 275-76)—in fact, as the case came to this Court, the statute was not within the "powers reserved" by the text of the Amendment *at all*, since it did not purport to regulate the "importation" or "transportation" of alcoholic beverages for "delivery or use" within the State of Hawaii. Indeed, the State had "expressly disclaimed any reliance upon the Twenty-first Amendment in the court below" (*id.* at 274 n.12), and "instead acknowledge[d] that the purpose [of the statute] was to promote a local industry." *Id.* at 276. The amendment was not even cited in the litigation until the State filed "its brief on the merits in this Court." *Id.* at 274 n.12.

Thus, the issue in *Bacchus* was whether, despite the apparent inapplicability of the *text* of the Twenty-first Amendment, the general policies reflected in the amendment (to the extent they could be gleaned from its history) could belatedly "save" a state statute that was concededly enacted for nakedly protectionist reasons. *Id.* at 274. Relying primarily on "the obscurity of the legislative history of § 2" and "[d]oubts about the scope of the Amendment's authorization," the Court "reject[ed] the State's belated claim based on the Amendment." *Id.* at 274-76. The Court instead concluded that Hawaii's taxing structure "violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products." *Id.* at 273.

Unlike the tax scheme at issue in *Bacchus*, New York's regulatory regime dictates the conditions under which liquor can be "shipped into the state." ABC Law § 102(1)(c). In other words, New York's law regulates the *sine qua non* of "importation"—*i.e.*, the physical bringing of alcohol into the State from elsewhere. Each of this Court's decisions under the Twenty-first Amendment—old or new—has been premised on the notion that the "importation of intoxicants" is "a regulatory area where the State's authority under the Twenty-first Amendment is transparently clear." *Craig*, 429 U.S. at 207 (citing *Hostetter*, 377 U.S. at 330 & n.9). Thus, unlike the tax statute at issue in *Bacchus*, New York's law falls squarely within the plain text of the Amendment; there is no

need here to examine the drafting history, obscure or otherwise, to determine the extent to which the amendment's policies might extend "the scope of the Amendment's authorization" (*Bacchus*, 468 U.S. at 276) *beyond its text*. Because New York's direct-shipment ban is within the class of laws expressly described in § 2, it is immune from scrutiny under the dormant Commerce Clause.[8]

That *Bacchus* is irrelevant to laws, such as New York's, that directly regulate the *importation* of liquor for domestic consumption is demonstrated by *North Dakota* v. *United States*, *supra*, in which the author of *Bacchus* joined the *Bacchus* dissenters in a plurality opinion that expressly relied on *Young's Market* in sustaining a North Dakota law requiring special labels for liquor purchased from out-of-state distillers. The plurality reiterated that "the State has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system." 495 U.S. at 431. The plurality further held that the "establish[ment] of a comprehensive system for the distribution of liquor within its bor-

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[8] *Bacchus* is the only decision of this Court since 1933 that has invalidated a State's regulation of intoxicants intended for domestic consumption on the dormant Commerce Clause theory that such regulation impermissibly favored local industry. As the dissent in that case made abundantly clear, this Court's precedents would have supported a decision upholding Hawaii's tax scheme despite the State's failure to articulate any Twenty-first Amendment defense until it filed its merits brief in this Court. But however that may be, *Bacchus*'s dormant Commerce Clause analysis undoubtedly is at the outer edge of what is consistent with the larger body of this Court's Twenty-first Amendment precedents. Indeed, if petitioners were correct that *Bacchus* must be read as sweepingly as they suggest, the case would become so manifestly inconsistent with so many of this Court's Twenty-first Amendment precedents as to warrant its overruling. *See* Br. of Ohio and 32 Other States as *Amici Curiae* in No. 03-1116, at 11-12.

ders" is "unquestionably legitimate" and "within the core of the State's power under the Twenty-first Amendment." *Id.* at 432. Justice Scalia, concurring in the judgment, agreed that the Twenty-first Amendment "empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Id.* at 447.[9]

3. In sum, *all* of this Court's Twenty-first Amendment decisions make clear that state statutes that regulate the "transportation or importation" of alcoholic beverages "for delivery or use [within the State]," are immune from dormant Commerce Clause challenge. *See* Pet. App. 17a, 23a-24a; *Bridenbaugh*, 227 F.3d at 853. Because the New York statute challenged in this case directly regulates the importation

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[9] Petitioners quote Justice Scalia's statement that his concurrence in *North Dakota* "is not to say, of course, that the State may enact regulations that discriminate." Pet. Br. 35. What Justice Scalia actually said was that States may not "enact regulations that discriminate *against the Federal Government*." 495 U.S. at 448 (emphasis added). The impermissibility of that kind of "discrimination," however, has nothing to do with the dormant Commerce Clause, but flows instead from doctrines of intergovernmental immunity not at issue here. Petitioners similarly twist Justice Scalia's words when they assert that a law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment." Pet. Br. 35. The omitted context makes clear that the "discriminatory character" adverted to by Justice Scalia in *Healy* was the law's "imposition of price restrictions" on beer sold in *other* States, not the State of importation. *Healy*, 491 U.S. at 344 (concurring opinion). Finally, Justice Scalia's concurrence in *North Dakota* can hardly be read, as petitioners suggest (Br. 31), to mean that a State can require "all," but not less than "all," liquor to pass through a three-tier system. Indeed, if that were what Justice Scalia meant, his decision to provide the fifth vote to uphold North Dakota's regulatory scheme—which gave the federal government the "option" to buy liquor *outside* of the three-tier system—would be inexplicable. 495 U.S. at 447-48.

of liquor for domestic use, petitioners' dormant Commerce Clause claim necessarily founders on the plain text of the Twenty-first Amendment.

B. New York's Regulation Of The Importation And Distribution Of Liquor Furthers The Core Purposes Of The Twenty-first Amendment

New York's ABC Law regulates the "importation" of liquor for "delivery" within the State. As a result, unlicensed direct shipments "in violation of" that law are expressly "prohibited" by § 2 of the Twenty-first Amendment. Accordingly, it does not matter whether New York's law furthers the "core concerns" of the Twenty-first Amendment. *Bridenbaugh*, 227 F.3d at 851 ("our guide is the text and history of the Constitution, not the 'purposes' or 'concerns' that may or may not have animated its drafters").

Even if, however, the Court felt it necessary to look beyond the plain language of the Twenty-first Amendment, and examine whether New York's statute is consistent with the Twenty-first Amendment's "purposes" or "concerns," such review would yield the same result: New York's statute is constitutional. In upholding the challenged statute at issue in *North Dakota*, the plurality stated that North Dakota's "unquestionably legitimate" three-tier distribution system served the State's interests of "promoting temperance, ensuring orderly market conditions, and raising revenue." 495 U.S. at 432. Likewise, as the comprehensive record here demonstrates and the court of appeals found, New York's three-tier system "is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York." Pet. App. 27a (citing *North Dakota*, 495 U.S. at 432).

1. By requiring all who traffic in alcoholic beverages to be licensed and to maintain a physical presence within the State, New York ensures "orderly market conditions" through transparency and accountability. The ABC Law allows the State "to monitor the distribution and sale of alco-

holic beverages by permitting such distribution and sale only through state-licensed entities supervised by, and accountable to, the [State Liquor Authority]." Pet. App. 25a.

Those who wish to sell liquor in New York are subject to a host of legitimate state regulatory requirements. These include bonding of licensees and permittees (ABC Law § 112), labeling requirements and brand name registration (§ 107-a), bottling requirements (§ 96-a), price-posting requirements (§ 101-b), transportation requirements including bills of lading (§ 117), and the maintenance of detailed records (§ 103). *See also* C.A. App. 1726-29. The physical presence requirement ensures that "[r]ecords of sales and compliance with New York's regulatory requirements" are "available for inspection" by New York officials. Pet. App. 25a; *see Milton S. Kronheim & Co.* v. *District of Columbia*, 91 F.3d 193, 203-04 (D.C. Cir. 1996) ("legitimate state interests which would be promoted by requiring geographic proximity of warehouses" include "auditing company records, monitoring compliance with the ABC laws, monitoring licenses, [and] checking tax forms for audits"). In addition, the bond required of all licensees is available to state officials for the assessment of any fines. Pet. App. 26a.

It would be virtually impossible for New York officials to monitor compliance with this complex and reticulated regulatory regime by every out-of-state entity that wished to ship liquor to consumers within the State. As the court of appeals observed, "[i]n 2000, there were over 2,100 wineries in the country, a 275% increase since 1975. Requiring New York officials to traverse the country to ensure that direct sales to consumers (no matter how small) comply with New York law would render the regulatory scheme useless." Pet. App. 28a. Indeed, if New York were to dispense with its presence requirement as a condition for the issuance of licenses, the costs of such enforcement burdens would effectively convert its regulatory scheme for liquor into an "honor system." But as the evidentiary record in this case demonstrates, New York is well justified in believing that those in

petitioners' position would not voluntarily abide by the law: when asked about unlicensed direct shipments that they may have made in the past, the winery petitioners declined to answer on the basis of the Fifth Amendment privilege against self-incrimination. *See* C.A. App. 1214-25.

For all these reasons, "New York treats wine importers the same as it treats internal sellers; all must either utilize the three-tier system or obtain a physical presence from which the state can monitor and control the flow of alcohol." Pet. App. 26a. This undoubtedly puts economic burdens on those who would sell liquor in New York, as petitioners contend (Br. 24-25); but there is no reason why they should be able to shift to the State their costs of doing business. "Section 2 does not require that New York bear the burden in attempting to ensure proper compliance with its . . . regulatory system regarding imported wine." Pet. App. 28a. New York has made the rational determination that a physical presence is required to assure that those in the liquor trade play by the rules (Pet. App. 27a-28a); out-of-state wineries may establish such a facility if they wish to sell directly to New York consumers, or they may avail themselves of the traditional three-tier system.[10]

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[10] Direct shipment of liquor by unlicensed (and hence unaccountable) out-of-state producers would also interfere with two other state interests that lie at the core of the Twenty-first Amendment: The promotion of moderation, and the collection of revenue. With respect to the first, a principal objective of the ABC Law is "fostering and promoting temperance." J.A. 11 (ABC Law § 2). The undisputed evidence showed a much greater incidence of wine consumption (40%) and binge drinking among both minors (16.5%) and all drinkers (10.5%), in States that permit direct shipping as compared to States (such as New York) that do not. C.A. App. 763-66, ¶¶ 30-37, 38-39; 1252-1363; 1366-69. A leading expert on alcohol abuse testified that direct shipping is "bad public policy for any state such as New York that wants to promote temperance" and will result in more underage drinking. J.A.

2. Petitioners object that the three-tier system raises prices and reduces consumer choice. Pet. Br. 7-8, 15.[11] Even if that were true, it would be irrelevant to the constitutional question in this case. New York is under no constitutional command to make liquor available cheaply, or in great variety, to its citizens; on the contrary, the Twenty-first Amendment allows the State to control what (if any) kind of liquor is available, and at what price. As this Court put it in *Young's Market*, "a State might establish a state monopoly of

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129, ¶ 1; J.A. 134, ¶¶ 14-15; J.A. 137-38, ¶ 25. With respect to the second, the three-tier system ensures the collection and remittance of excise and sales taxes on alcohol by parties licensed by, and physically present in, the State. Again, the evidence was undisputed that New York's regulatory system "provides an extremely effective mechanism for tax collection." J.A. 70, ¶ 22; *see also* C.A. App. 867-68; 892-93; 2714-16; 2721-22; 2724-28; 2764-65; 2767-70; 2812-14; 2837-39. By contrast, attempting to collect taxes from out-of-state shippers both would raise constitutional concerns (*see Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992)) and would be "extraordinarily difficult as a practical matter" to enforce. C.A. App. 2722; *see also* J.A. 70.

[11] In this regard, petitioners place much reliance on a report prepared by *the staff* of the Federal Trade Commission regarding the supposed consumer "benefits" of direct shipment. Pet. Br. 8, 37, 43-44. This staff report does not reflect the official position of the FTC, much less the federal government. It consists largely of factual assertions that are not part of the record and were not subjected to the adversarial process, and thus can provide no basis for decision. In fact, the staff report is based on a study of one small market (McLean, Virginia) that has nothing to do with New York market conditions as established in the evidentiary record in this case. Moreover, because it "takes no position on the constitutional issues raised in the lawsuits" (Report at 9), it is irrelevant to the legal questions before the Court. And it cannot, of course, serve as a substitute for the brief the Acting Solicitor General apparently has decided not to file.

the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee." 299 U.S. at 63. All of those options would raise prices and reduce choice, but none has ever been thought remotely unconstitutional.

Petitioners also claim that New York's system was adopted for "protectionist" purposes. Pet. Br. 19. That contention is wrong for at least two reasons. First, if New York's statutes are squarely within the power granted to the State by the plain text of the Constitution, it would scarcely matter *why* New York chose to restrict liquor importation as it has. Second, the court of appeals correctly concluded that petitioners' claim of protectionism does not withstand scrutiny. As that court noted, there is "no indication, based on the facts presented here, that the regulatory scheme is intended to favor local interests over out-of-state interests." Pet. App. 25a.

Petitioners first assert that the ABC Law was amended in 1970 "to close direct shipment loopholes" in order to "'prevent . . . competition with New York state licensees.'" Pet. Br. 19 (quoting *House of York, Ltd.* v. *Ring*, 322 F. Supp. 530, 533 (1970)). As the district court's decision in *York* makes clear, New York decided that mail-order deliveries of liquor from unlicensed, overseas shippers were disrupting "orderly market conditions" within the State, as well as the efficient operations of the tax and customs laws, and acted to put an end to such deliveries—as the Twenty-first Amendment authorized it to do. 322 F. Supp. at 533 ("The twenty-first amendment to the Constitution is dispositive of plaintiffs' claim that the disputed statute violates the Commerce Clause").

Petitioners also complain that the New York legislature voted in 1995 to authorize direct shipment, but that this bill was vetoed by the governor. This complaint, however, is political, not constitutional. Petitioners essentially ask this

Court to override the governor's veto—which after all is part of the process by which bills become law in New York—and legislate an outcome that the State's political branches have declined to produce. The Twenty-first Amendment precludes such interference with New York's right to control the traffic of liquor across its borders.[12]

Finally, petitioners assert that the exemptions allowing licensed, in-state wineries to ship directly to consumers "are intended to promote New York wineries." Pet. Br. 20. New York has decided that the physical presence of these wineries is sufficient to ensure compliance with the regulatory structure, such that they may be granted limited exemptions from the three-tier system. Pet. App. 25a-26a. This clearly legitimate determination by the State is not rendered invalid merely because it may redound to the economic benefit of in-state wineries. Indeed, under these limited in-state delivery exceptions, it is still the case that every drop of alcohol distributed in New York must pass through a licensed in-state party whose premises and records are easily and readily available to the State. The same opportunity is available to those out-of-state wineries that elect to subject themselves to the same regulatory burdens.

In sum, whether the Court examines New York's statute under the plain language of the Twenty-first Amendment, the purposes of the Twenty-first Amendment, or both, the result

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[12] Similarly, petitioners contend that although "the advent of the Internet" (Br. 32) makes it technologically possible "for consumers to obtain any wine from any winery" (Br. 7), political forces have prevented such a regime from becoming legally possible (Br. 5, 7-8, 18-20, 37 & n.25). But as the court of appeals correctly recognized: "Changes in marketing techniques or national consumer demand for a product do not alter the meaning of a constitutional amendment." Pet. App. 29a.

is the same—New York's three-tier regulatory scheme unquestionably is constitutional.

II. New York's Regulatory Scheme Cannot Violate The Dormant Commerce Clause In Light Of The Webb-Kenyon Act

Wholly apart from the Twenty-first Amendment, the dormant Commerce Clause is not implicated here because Congress, in enacting (and reenacting) the Webb-Kenyon Act, has exercised its plenary power under the Commerce Clause, and expressly authorized the States to pass statutes such as New York's prohibition on the direct shipment of liquor from unlicensed, out-of-state producers to in-state consumers.

1. It is axiomatic that the dormant Commerce Clause comes into operation only in the *absence* of congressional action. As this Court has explained: "It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 12 (1986). In other words, Congress, in the exercise of its affirmative authority under the Commerce Clause, may authorize the States to do that which they otherwise would be precluded from doing by the "dormant" aspect of the Clause.

That principle controls here because, quite apart from the controlling effect of the Twenty-first Amendment, Congress has plainly authorized the provisions of New York's liquor laws that petitioners challenge. The Webb-Kenyon Act—originally enacted in 1913 and reenacted in 1935—prohibits "[t]he shipment or transportation" of liquor "from one State . . . into any other State . . . in violation of any law of such State." 27 U.S.C. § 122. This language is clear and unambiguous. It authorizes the several States to restrict importation of liquor on whatever terms they deem appropriate. Any

ambiguity is resolved in the States' favor by the title of the statute—"[a]n act divesting intoxicating liquors of their interstate character in certain cases." *Id.*; *see FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959). New York's ABC Law, which directly regulates the "shipment or transportation" of liquor into the State, is well within the "certain cases" described by the statute. Quite simply, there is no basis for concluding that the Commerce Clause is "dormant" in this case.

Indeed, in *Clark Distilling* this Court already ruled that the unmistakable purpose of the Webb-Kenyon Act was "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." 242 U.S. at 324; *see also id.* at 325 ("the Webb-Kenyon Act . . . took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law"); H.R. REP. NO. 1461, 62d Cong., 3d Sess. 1 (1913) (Webb-Kenyon "withdraw[s] the protecting hand of interstate commerce from intoxicating liquors transported into a State"). And in the same case this Court also ruled that—notwithstanding claims of "discrimination"—*no* Commerce Clause claim can survive with respect to state laws that regulate the importation of liquor for domestic use. As the Court explained, because the shipment and receipt of liquor had been "in express terms divested by the Webb-Kenyon Act of their interstate commerce character," there is "no possible reason for holding that to enforce the provisions of the state law would conflict with the commerce clause of the Constitution." *Id.*[13]

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[13] Petitioners might argue that the Webb-Kenyon Act only applies to States that prohibit the distribution and sale of liquor altogether. *See Bolick* v. *Roberts*, 199 F. Supp. 2d 397, 431 n.24 (E.D. Va. 2002) (citing *Adams Express Co.* v. *Kentucky*, 238 U.S. 190, 199-200 (1915), for this proposition), *vacated as moot sub nom. Bolick* v. *Danielson*, 330 F.3d 274 (4th Cir. 2003). In *Clark*

The principle that Congress may exempt even overtly discriminatory state laws from Commerce Clause scrutiny has been repeatedly reaffirmed by this Court since its decision in *Clark Distilling*. *See, e.g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946); *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983).[14] As the Court put the point in *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Id.* at 652-53.

Here, Congress reenacted the Webb-Kenyon Act without change after *Clark Distilling* broadly construed the original

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Distilling, however, this Court rejected that precise claim (242 U.S. at 324) and also noted that "[a]ll that was decided" in *Adams Express* was that the Webb-Kenyon Act did not apply on the facts, because "the court of last resort of Kentucky . . . had held that the state statute did not forbid shipment and receipt of liquor for personal use." *Ibid.*

[14] In *Benjamin*, for example, Prudential challenged on dormant Commerce Clause grounds a South Carolina statute that imposed a tax on out-of-state insurance firms doing business in the State that did not apply to in-state insurers. 328 U.S. at 410-11. Although *Benjamin* "assumed" for purposes of its analysis that the tax was "discriminatory"—as, at least under petitioners' theory of "discrimination," it clearly was, *id.* at 429—it held that there was "[n]o conceivable violation of the commerce clause, in letter or spirit." *Id.* at 436. That was because Congress was deemed to have authorized such discrimination by enacting the McCarran-Ferguson Act, and Congress—the Court held—"is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade." *Id.* at 434 (footnote omitted).

statute as removing the protections of interstate commerce from "all receipt and possession of liquor prohibited by state law." 242 U.S. at 325. Congress must therefore be deemed to have adopted that interpretation of the statute. *See Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). Because New York's regulatory regime clearly falls within the scope of the congressional authorization, it necessarily is "invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co.*, 451 U.S. at 652-53.

2. Petitioners devote but a single sentence to the Webb-Kenyon Act, in which they assert that the statute "narrowed the scope of the Commerce Clause but did not eliminate it." Pet. Br. 31. That assertion cannot be reconciled with this Court's decision in *Clark Distilling*, which expressly held that the Webb-Kenyon Act *did* "eliminate" any Commerce Clause impediments to state restrictions on the importation of liquor from other States. *See* 242 U.S. at 327 (Congress "permitt[ed] the prohibitions in one state to prevent the use of interstate commerce to ship liquor from another state"). Petitioners do not cite, much less adequately distinguish, *Clark Distilling*, nor do they ask that it be overruled. It squarely forecloses not only their effort to explain away the consequence of the Webb-Kenyon Act but also the entirety of their constitutional challenge to the New York direct-shipment ban.

Perhaps recognizing that the Webb-Kenyon Act is dispositive of this case, petitioners seek to divert the Court's attention by discussing an *earlier* statute—the Wilson Act. Pet. Br. 31 (citing *Scott* v. *Donald*, 165 U.S. 58, 100 (1897)). Although petitioners appear to believe that the Wilson Act embodies a congressional mandate of non-discrimination, the case they cite merely concluded that the Congress, in passing that statute, had not intended completely to displace the dormant Commerce Clause. *See Scott*, 165 U.S. at 92; *see also Clark Distilling*, 242 U.S. at 323; *Vance*, 170 U.S. at 448-50. In other words, as interpreted by this Court, the Wilson Act reversed the result of *Leisy*, but left intact *Bowman*'s holding.

But none of that is of any help to petitioners, because, as is clear from *Clark Distilling*, the later-enacted Webb-Kenyon Act effectively abrogates *Bowman*, *Rhodes*, and *Vance*.[15]

Indeed, the fact that this Court had interpreted the Wilson Act so as not to displace entirely the Commerce Clause with respect to liquor—and thus to permit *some* Commerce Clause challenges to state laws that regulated liquor importation—but had interpreted the later-enacted Webb-Kenyon Act so as to remove "all" Commerce Clause objections to such regulations presumably explains why Congress reenacted the Webb-Kenyon Act, but not the Wilson Act, in

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[15] It is instructive to compare petitioners' core assertion in this case—*i.e.*, that the dormant Commerce Clause precludes enforcement of New York's prohibition on shipping out-of-state liquor directly to consumers—with *Vance*, where the Court held that "the inhibitions of a state statute do not operate to prevent liquors from other States from being shipped into such State, on the order of a resident for his use." 170 U.S. at 452. If this aspect of *Vance* had remained the law, petitioners' claim would be well-founded, since it presumably makes no constitutional difference whether the in-state consumer places his order by mail (as in *Vance*) or over the telephone or Internet. But the Commerce Clause analysis of *Vance* is *not* the law that applies to liquor shipments. Congress enacted the Webb-Kenyon Act specifically to repudiate that aspect of *Vance* (and the analogous views expressed in *Rhodes*) and to stem the burgeoning mail-order liquor trade made possible by this Court's decisions. *See Clark Distilling*, 242 U.S. at 323-24; 49 CONG. REC. 699-700 (Dec. 16, 1912) (Sen. Sanders); 49 CONG. REC. 761 (Dec. 17, 1912) (Sen. Kenyon); 49 CONG. REC. 2,898 (Feb. 10, 1913) (Sen. Curtis). The purpose of Webb-Kenyon, in other words, was to allow States to do precisely what petitioners claim that New York may not—restrict the importation of liquor from out-of-state sources. This Court will avoid interpreting a statute in a manner inconsistent with its text and manifest purpose. *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 827 (1997); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 237 (1985).

1935. Although neither statute had been formally repealed during Prohibition, Congress was careful to turn square corners to make doubly sure that the Webb-Kenyon Act would retain its effectiveness. In light of this Court's cases construing both statutes, however, it must have been evident then—as it is today—that the Wilson Act, even if still technically on the books, retained no continuing significance with respect to the issue here.

Moreover, even if the Wilson Act retained some independent significance despite the passage of the Webb-Kenyon Act, it would still not assist petitioners in this case. The Act provides only that all liquor transported into New York "shall *upon arrival* . . . be subject to the operation and effect" of New York laws "to the same extent and in the same manner" as if such liquor had been produced in New York. 27 U.S.C. § 121 (emphasis added). In *Rhodes* and *Vance*, *supra*, this Court authoritatively construed the "arrival" requirement of the Act to mean the delivery of liquor to the ultimate consignee within the State, rather than passage of the liquor through the State's border. Congress has not amended the Wilson Act in any relevant respect since those decisions. Accordingly, to the extent the Act might retain independent significance, it would have no bearing on the New York laws challenged in this case, which restrict the importation of liquor *before* it "arrives" in the State by being delivered to a licensed consignee. *Rhodes*, 170 U.S. at 421-23.

In sum, even if petitioners are right that New York's ABC Law "discriminates" against interstate commerce, any such discrimination is authorized by the Webb-Kenyon Act. The Webb-Kenyon Act, as construed by this Court in *Clark Distilling*, plainly answers the question presented in this case by disposing of any conceivable challenge under the dormant Commerce Clause to New York's direct-shipment ban.

III. New York's Regulatory Scheme Is Constitutional Even Under Petitioners' Proposed Analysis Of The Dormant Commerce Clause

Petitioners make much of this Court's recognition in *Hostetter* that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," and that "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter*, 377 U.S. at 332. On the basis of such statements, petitioners urge the Court to "accord dignity to both the Commerce Clause and [the] 21st Amendment." Pet. Br. 39. As already explained, not only have petitioners uprooted such language entirely from its context, but they have also overlooked the fact that the Commerce Clause simply is not "dormant" in this case. But even if this Court were to overlook those failings and adopt petitioners' proposed analytical approach—*i.e.*, to "accord dignity" to both constitutional provisions—the conclusion that petitioners urge would not follow, because petitioners fail to practice what they preach: Their dormant Commerce Clause analysis gives *no* weight to the special constitutional status of alcoholic beverages.

Petitioners ignore the long history of alcohol regulation, including its constitutional and statutory underpinnings, and analyze New York's prohibition on the unregulated importation of liquor under the same "dormant" Commerce Clause standards applicable to commercial products and services such as milk or trash processing. *See* Pet. Br. 24 (citing *Dean Milk Co.* v. *Madison*, 340 U.S. 349 (1951), and *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994)). By so doing, petitioners fail to perform the "accommodation of the Twenty-first Amendment with the Commerce Clause" that their own reading of precedent and the constitutional text would necessarily require. *Hostetter*, 377 U.S. at 333.

This Court has made clear that "the Twenty-first Amendment requires" an "added presumption in favor of the

validity of . . . state regulation" of liquor. *California* v. *LaRue*, 409 U.S. 109, 118-19 (1972). Even where another constitutional provision is clearly implicated, "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment." *Id.* at 115. Or, as the plurality put it in *North Dakota*: "Given the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." 495 U.S. at 433 (citing *Capital Cities*, 467 U.S. at 714).

Petitioners complain that the New York regime is "discriminatory" because out-of-state liquor producers must sell to a licensed wholesaler, whereas some in-state wineries may obtain a license to sell directly to consumers. Pet. Br. 20. But this case comes to the Court on a full evidentiary record—a record on which petitioners utterly failed to establish that New York's licensing requirements have a discriminatory effect. In fact, petitioners' expert conceded in the district court that elimination of the direct-shipment ban would not "change anything"—*i.e.*, even if the identity of particular out-of-state shippers might change at the margins, the volume of out-of-state wine sold in New York would remain the same regardless. C.A. App. 1090-91; 1106-07.

Petitioners again conceded in their brief before the Second Circuit that the direct-shipping ban does not "impact" the "volume" of wine flowing into New York. Pet. C.A. Br. 33. Those concessions are dispositive of any claim of discriminatory impact. As this Court noted in *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127-28 (1978), "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulation." Thus, "interstate commerce is not subject to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate seller to another." *Id.* at 127.

Moreover, petitioners acknowledge that out-of-state wineries may obtain the same license to ship directly to consumers as in-state wineries by establishing a physical presence within the State. Pet. Br. 21. Although they contend that requiring a New York presence amounts to discrimination *per se* (*id.* at 23), petitioners simply ignore the fact that *per se* rules are rarely applicable where, as here, Congress has legislated in the area. *Cf. United States* v. *NASD*, 422 U.S. 694, 729-30 (1975). This principle applies *a fortiori* where, also as here, the Constitution confers regulatory authority on the States. The Twenty-first Amendment "gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity." *Duckworth* v. *Arkansas*, 314 U.S. 390, 399 (1941) (Jackson, J., concurring). The State's legitimate interest in liquor regulation is ample justification for a physical presence requirement. *Cf. Ziffrin*, 308 U.S. at 139 (upholding licensing requirement as "clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils, and secure payment of revenue"). Petitioners therefore have not established that New York's regulatory regime is facially discriminatory.[16]

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[16] Petitioners contend that even if the physical presence requirement is constitutional, the "easiest direct sales and shipping options . . . are available only to wines made from New York grapes." Pet. Br. 26-27 ("ABC Laws §§ 76(2)(a) (tastings); 76(4) and 77(4)(b)(4) (allowing sales and deliveries of New York state labeled wines from other wineries and at dinner theaters); 76(5) (allowing sales at state and county fairs and farmers [sic] markets); 77(5) (allowing sales on Sundays and at the state fair)"). These limited, on-site sales provisions are truly *de minimis*, which presumably explains why petitioners did not raise any objection to them in the courts below. Indeed, it is hard to see a logical connection between any Commerce Clause objection that might be framed against these on-site tasting provisions, and the remedy that

In light of the Twenty-first Amendment, it cannot be disputed that state regulation of the importation and distribution of liquor serves a "legitimate local public interest" as that term is used in this Court's dormant Commerce Clause cases. *E.g.*, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Since the direct-shipment ban is not "discriminatory," it "will be upheld" unless the burden on interstate commerce is "clearly excessive" in relation to the State's interest in liquor regulation and licensing. *Ibid.* In performing this balancing, the Twenty-first Amendment must weigh heavily on the State's side of the scale. That focus necessarily requires a recognition that the only "burden" imposed by New York law on out-of-state liquor sellers is to bring them within the same tightly controlled and heavily monitored regulatory framework in which every other New York licensee is required to operate.[17]

Petitioners have not even acknowledged, much less attempted to carry, their burden of showing that New York's ABC Law so impedes commerce as to preclude the State

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petitioners seek here. Petitioner Swedenburg is not asking that she be permitted to transport a bottle of her wine to New York in order to conduct a tasting at a state fair; she and the other petitioners seek to ship directly to consumers throughout the State without regard to New York's licensing requirements. In other words, petitioners now seek to uproot New York's entire regulatory tree on the basis of this belatedly marshaled "discriminatory" twig.

[17] As this Court has noted in other contexts, the "dormant Commerce Clause has no job to do" where the products in question are not similarly situated. *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 298-99, 303 (1997). Here, *all* wine that is lawfully delivered in New York—whether imported through wholesalers or shipped directly to consumers from a New York winery—is *regulated*. By contrast, petitioners ultimately seek to create an entirely different market for out-of-state wine than the market in which *all* New York wine must compete—an *unregulated* interstate market.

from exercising its constitutional prerogative to restrict the importation of liquor. Petitioners' own proffered "hybrid" analysis of the constitutional issues in this case—properly performed—compels the rejection of their claims.

IV. If There Is Any Constitutional Defect In New York's Regulatory Scheme, The Remedy Should Be Narrowly Tailored

Petitioners concede that New York could constitutionally "require that *all* wine, not just wine delivered from out-of-state wineries, [to] pass through the three-tier system." Pet. Br. 40. Their complaint is that *some* wine—wine sold by licensed in-state wineries—can "bypass" this system and ship directly to consumers. If the Court were to conclude that this scheme is constitutionally defective, then the remedy is to sever and strike the exemptions allowing direct shipment by licensed, in-state wineries—not, as the district court thought, to open up New York's liquor market to all unlicensed out-of-state producers.

Severability is a question of state law, and where state law allows severance of an offending provision there is no cause to invalidate more of the statute than necessary. *Leavitt* v. *Jane L.*, 518 U.S. 137, 143-44 (1996); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985); *see also McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 51-52 (1990). "Under New York law, a court should refrain from invalidating an entire statute when only portions of it are objectionable." *Gary D. Peake Excavating Inc.* v. *Town Board*, 93 F.3d 68, 72 (2d Cir. 1996) (internal quotation marks and citation omitted); *see also New York ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N.Y. 48, 60 (1920) (Cardozo, J.).

The ABC Law expressly provides that if "any part, provision or section" is "held invalid by any court," the rest of the statute "shall not be affected thereby." ABC Law § 161 (J.A. 16). The law authorizing direct shipment by "farm

wineries" also contained its own severability clause. 1993 N.Y. Laws 1194, 1202, ch. 490, § 24.

Thus, the New York legislature has made clear that any provision of the ABC Law found to be invalid should be severed from the whole, so as to preserve the integrity of the overall regulatory framework. The district court found constitutional fault with only those provisions of the ABC Law that allow in-state wineries to ship their wines directly to in-state consumers. Pet App. 53a n.20 ("The Court is *not* here ruling that New York's three-tier system (standing alone and apart from its exceptions) is unconstitutional"). Striking only those provisions would work the least intrusion on the ABC Law by maintaining the overall regulatory framework requiring all those trafficking in alcoholic beverages to be licensed by and, thus, accountable to the State. *See Beskind* v. *Easley*, 325 F.3d 506, 516, 518-19 (4th Cir. 2003).

More than 90% of the wine sold in New York comes from other States. J.A. 87-88 & n.25. The remedy requested by petitioners—the complete elimination of the direct-shipment ban—would allow a flood of wine (not to mention rum, bourbon, and beer) to evade the New York regulatory regime by going directly from unlicensed, out-of-state producers or other purveyors to in-state consumers. By contrast, wine lawfully shipped directly to New York consumers currently comprises less than 0.5% of all wine sales in the State. J.A. 208-12. Requiring this relative trickle to flow through the three-tier system by severing and striking the exemptions of which petitioners complain would work a far less drastic undoing of New York's complex and reticulated scheme of alcoholic beverage control.[18]

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[18] *Califano* v. *Westcott*, 443 U.S. 76 (1979), does not, as petitioners contended below, suggest that the proper remedy is the extension of the in-state delivery options to out-of-state producers. *First*, in *Califano*, the Court was dealing with severability issues

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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governed by *federal* law, not New York law. *Second*, as *Califano* makes clear, the principle that extension is the proper remedy applies to federal statutes involving benefits programs where government largesse is the legislative purpose. *See id.* at 90. Here, in contrast, the ABC Law is a comprehensive regulatory statute designed to ensure that all those trafficking in alcohol are accountable to the State—a purpose that would be defeated by allowing unlicensed, out-of-state wineries to ship their wines directly to New York consumers.

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